APPENDIX A — MEMORANDUM AND ORDER OF THE APPEALS COURT OF THE COMMONWEALTH OF MASSACHUSETTS DATED OCTOBER 22, 2002

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

00-P-798

CITIZENS BANK OF MASSACHUSETTS

vs.

BAHIG BISHAY[1] & others.[2]

MEMORANDUM AND ORDER
PURSUANT TO RULE 1:28

This appeal by the defendants (collectively Bishay), is from the entry of a judgment ordered in 1999 by a Superior Court judge in favor of Citizens Bank for $360,427.99 for attorney's fees and costs which were allowed as reasonable collection costs relating to a loan made to Bishay in 1988 (A.4225,4229). Bishay also appeals from three prior summary judgement orders of the same judge which dismissed his

1. Individually and as trustee of Old Post Road Realty Trust and Commonwealth Realty Trust.

2. Bishay Motors & Leasing, Inc., formerly known as Bishay Motors, Inc.; Massachusetts Auto. Group, doing business as Bishay Isuzu; U.S. Auto Exchange Group Ltd.; and 1095 Commonwealth Ave. Group (A.2).

counterclaims against Citizens Bank related to its collection of the loan (A.4230). The loan was repaid through a proceeding in the United States Bankruptcy Court, concluded pursuant to a confirmatory order issued in 1996 (A.288,4230).

In this appeal, Bishay principally presents the issue whether, and to what extent, his rights were preserved in the bankruptcy proceeding to pursue his counterclaims against Citizens Bank in the Massachusetts courts (B.Br.3-4). He argues that the Superior Court judge's rulings, principally based on res judicata grounds, did not reach the full extent of those claims and thereby deprived him of his day in court. We conclude the judge's decisions were correct and affirm.

Citizens Bank commenced this action in June, 1995, by filing a verified complaint in the Superior Court (A.19). Bishay's answer contained a counterclaim in two counts, the first alleging a breach of good faith and fair dealing, and the second an alleging unfair trade practices under G.L. c. 93A (A.70,74). Bishay then filed two voluntary petitions in bankruptcy, the first in July, 1995, for 1095 Commonwealth Ave. Corp., and the second, individually, in September, 1995, which subsequently were consolidated for administration (A.218). The plan, confirmed by order of the Bankruptcy Court in April, 1996, permitted Bishay to pursue his counterclaim.[3] After Citizens Bank moved in the Superior Court to dismiss the counterclaim in June, 1996, Bishay moved to

3. The plan allowed Citizens Bank's claim for payment of the loan balance and also allowed retention of a lien on Bishay's assets to permit recovery of attorney's fees and costs in defending against Bishay's counterclaim (A.279-280).

amend it, and the amendment was allowed by a motion judge in November, 1996 (A.690), resulting in a counterclaim of six counts (A.692-726). Four decisions by a different Superior Court judge followed, resulting in the dismissal of Bishay's entire amended counterclaim and the award of collection costs to Citizens Bank.

1. *Application of res judicata.* In the first of the Superior Court orders challenged by Bishay in this appeal, the judge considered the parties' cross motions for summary judgment on Bishay's several counts in the amended counterclaim (A.2205,2216). The judge correctly stated the controlling principle as follows: "The application of res judicata to a bankruptcy court order confirming a Chapter 11 reorganization plan generally bars later proceedings on all claims and issues concerning the debtor-creditor relationship that were actually raised during the confirmation process as well as those that could have been raised. . . ." (A.2219). See *Monarch Life Ins. Co. v. Ropes & Gray*, 65 F.3d 973, 978 & n.8 (1st Cir. 1995) (res judicata principles applicable to confirmation orders of a bankruptcy court). "Under a generally accepted exception to the res judicata doctrine, a party's claims are not precluded by a prior action if the court in that action expressly reserves those claims for later adjudication. *Apparel Art Intern. v. Amertex Enterprises[, Ltd.]*, 48 F.3d 576, 586 (1st Cir. 1995). *D & K Properties Crystal Lake v. Mutual Life Ins. [Co.]*, 112 F.3d 257, 260 (7th Cir. 1997)." (A.2220).

The judge reviewed the relevant language in the reservation clause of the plan confirmed by the Bankruptcy

Court,[4] correctly concluding from its wording and the record in that court that the original two counts in Bishay's counterclaim had not been adjudicated in that court and had been preserved so as to survive the confirmation order. Moreover, he stated those two counts "constitute independent claims which could be characterized as a set-off to Bishay's debt." (A.2222).

In contrast, however, the judge concluded that the additional four claims in the amended counterclaim[5] were in the nature of defenses to Bishay's obligations under the note, and that he essentially sought to relitigate the validity of that note and the forbearance agreement.[6] These additional

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4. "The Debtors' estates may retain, and by its duly authorized representative(s) settle, release or prosecute, their alleged claims against Citizens arising from the transactions between the Debtors and Citizens and related matters (the 'Alleged Claims')." (A.280).

5. We adopt the judge's summary description of the counts as follows: (I) allegations of "numerous breaches of [Citizens Bank's] express and implied duties" under the note and a forbearance agreement; (II) a claim that Citizens Bank is "estopped from treating the Note as a demand obligation and collecting the full amount"; (III) first count of prior counterclaim restated; (IV) a request for a declaratory judgment that the "Note and Forebearance Agreement are extortionate," and all payments should be ordered disgorged; (V) a claim of intentional infliction of emotional distress; and (VI) second count of prior counterclaim restated. (A.2222-2224; 712-724).

6. There is no merit in Bishay's argument that general or blanket type language in the reservation clause preserved his claims in the amended counterclaim. "A blanket reservation that seeks to reserve all causes of action reserves nothing. To hold otherwise would

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eviscerate the finality of a bankruptcy plan containing such a reservation, a result at odds with the very purpose of a confirmed bankruptcy plan." *D & K Properties Crystal Lake v. Mutual Life Ins. Co.*, 112 F.3d at 261.

Bishay's assertion that classification of Citizens Bank's claim as "impaired," means that approval of the claim was not final (B.Br.18), is without merit. That assertion ignores the plain language of section 6(a) of the reorganization plan which required full payment of the loan balance on or before December 27, 1996 (A.279). Further, no reasonable reading of 11 U.S.C. § 1124 (1984) supports that assertion.

There also is no merit in Bishay's assertion that he should receive a more favorable interpretation of the reservation clause because it was drafted by Citizens Bank. Compare *Union Carbide Corp. v. Newboles*, 686 F.2d 593, 595 (7th Cir. 1982) (approval of a plan by a creditor "cannot be deemed an act of assent having significance beyond the confines of the bankruptcy proceedings, simply because the gamesmanship imported from state contract law into the bankruptcy proceedings would be intolerable"). Moreover, there is no indication that Bishay did not have adequate opportunity to contest the plan or seek its modification.

Similarly, there is no merit in Bishay's request that we consider statements made by counsel for Citizens Bank at the confirmation hearing (B.Br.20-23). Compare *Sure-Snap Corp. v. State Street Bank & Trust Co.*, 948 F.2d 869, 873 (2d Cir. 1991) (even comments by a judge in a colloquy with debtors were "not dispositive of. . . allegedly reserved right," and did not affect application of res judicata principles). In the judge's third decision he stated, "Bishay now asks this Court yet again to adopt his interpretation of the reservation [clause]. This the court declines to do." (A.3392). We similarly decline any invitation by Bishay to consider any reinterpretation by reading any "intent" into the reservation clause (see B.R.Br.2-8).

claims were not expressly identified in the reservation clause, the bankruptcy schedules (A.3224-3267), or in the previously filed counterclaim in Bishay's answer to Citizens Bank's complaint.[7] Because the Bankruptcy Court ordered the payment of Citizens Bank's claim, inherent in that order is the court's determination of the validity and enforceability of the note and forbearance agreement. The judge therefore properly stated that "[f]inal orders of the bankruptcy court are res judicata as to all matters that were or could have been litigated before the bankruptcy court," see *Federal Deposit Ins. Corp. v. Shearson-American Exp., Inc.*, 996 F.2d 493, 497 (1st Cir. 1993), cert. denied, 510 U.S. 1111 (1994), and correctly concluded that the confirmation order had res

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7. The judge noted that the Bankruptcy Court allowed a joint motion on September 4, 1996, authorizing Bishay to employ special counsel to pursue the litigation then pending in the Superior Court, No. 95-1312A (A.2222 n.10).

There is no merit in Bishay's assertion that the counts in his amended counterclaim were preserved because his proposed version of that counterclaim was attached to a stipulation filed in the Bankruptcy Court with respect to a fee dispute. That filing occurred before the joint motion was allowed, and there is no indication that the amended counterclaim was brought within the scope of that motion.

In any event, the amended counterclaim was first filed in the Superior Court in August, 1996, some four months after the confirmation order dated April 23, 1996 (A.294), and after the expiration of the applicable bankruptcy appeal period. Bishay did not appeal the confirmation order.

judicata effect as to counts I, II, IV, and V of Bishay's amended counterclaim (A.2219,2224).[8]

2. *The surviving claims in the amended counterclaim.* Bishay seeks to pursue his dismissed amended count III and most of the count VI claims by raising events which occurred after the general release in a September 16, 1994, forbearance agreement he executed.[9] He argues that these counts were preserved by the reservation clause, and he asserts that the judge improperly dismissed those claims, essentially ignoring the effect of the release and res judicata (B.Br.27-48).[10]

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8. The judge subsequently denied Bishay's two motions for reconsideration of these rulings in his second and third decisions (A.2481-2482, 3391-3395).

9. In his first decision, the judge addressed Citizens Bank's contention that the general release served as a defense to count III and so much of count VI concerning events occurring prior to the release, and Bishay's claim that the release was not binding because he signed it under economic duress (A.2225). The judge's conclusion that Bishay's failure timely to object to the forbearance agreement, his subsequent conduct in accepting the benefits of Citizens Bank's forbearance, and his partial performance in making sporadic payments, constituted ratification of the agreement. The judge further concluded that because the general release was valid and binding, Bishay is precluded from asserting any claim against Citizens Bank arising from their relationship prior to September 16, 1994, and allowed summary judgment for Citizens Bank on count III and subsections a, b, c, d, e, g, h, and i of count VI (A.2229).

10. In the judge's second decision, he declined to reconsider his prior rulings on count III after Bishay filed a motion for reconsideration and submitted a joint stipulation which contained

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Bishay asserts that in 1995, Citizens Bank's refusal to accept full payment of the loan constituted (1) a breach of its obligations to him; (2) interfered with his business obligations; and (3) violated c. 93A (B.Br.31).[11] Even if we were to consider those claims not barred by the release and res judicata principles, they lack merit. In summary, (1) at the time in issue, there is no indication that Bishay ever tendered any payment or actually had a commitment for financing from another lender, and in indicating its intent to require a release, in the circumstances, Citizens Bank was not in breach of any obligation to Bishay; (2) no claim of interference could arise because Citizens Bank did not induce anyone to act unfavorably toward Bishay or impede his performance; and (3) the Bankruptcy Court's determination that the release of claims was proper thus precludes the c. 93A claim to the extent that it was based on Citizens Bank's collection efforts. Also, Bishay's argument (B.Br.36-44) attempting to revive his claim for intentional infliction of

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a proposed amended counterclaim. The judge rejected consideration of Bishay's claims alleging interference with contractual relations after the September 16, 1994, release, and declined to alter his ruling that only the two claims pending in the Superior Court at the time of the bankruptcy confirmation order had been preserved (A.2477-2479, 2481-2482).

11. The related factual background is that after filing the bankruptcies, in November, 1995, Bishay asked what terms Citizens Bank would require to discharge all its security for the defaulted loan if he could obtain financing to repay the loan. The response was that a release of all theoretical claims would be required (A.642-646). Bishay claims the collateral then securing the loan balance of $2.4 million was, disproportionally, worth $18 million (B.Br.30).

emotional distress and his unsupported characterization of Citizens Bank's conduct as unethical, oppressive, and unscrupulous and violative of c. 93A, fail to raise genuine issues of material fact.

With respect to Bishay's c. 93A argument (B.Br.45-48) based on Citizens Bank's two-tiered billing arrangement with its attorneys, for which it was sanctioned in the Bankruptcy Court (A.1310-1350), Bishay asserts that a causal relationship existed between that arrangement and Citizen Bank's refusal to accept payment of the loan in 1995, and contrary to the judge's conclusion, that he suffered damages. There is nothing in this assertion warranting disturbing the judge's careful analysis, concluding Bishay has no reasonable expectation of demonstrating that his alleged damages were caused by Citizens Bank's involvement in the two-tiered fee arrangement (A.3396-3398).[12]

3. *Award of attorney's fees.* In his fourth decision, and after a thorough analysis of the parties' claims, the judge determined that Citizens Bank had a right to recover $360,427.99 in attorney's fees and costs incurred as the

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12. Acting on a motion of Citizens Bank for reconsideration, the judge addressed the c. 93A issues raised in subsections f and k of count VI in his third decision (A.3396). He concluded that Bishay had not suffered any monetary loss in the course of the Bankruptcy Court's resolution of the two-tiered fee issue. He explained that "the amount of fees owed by Bishay was reduced to reflect the amount Citizens [Bank] itself would have paid its attorneys for the work. Moreover, the attorney's fees and expenses Bishay incurred in challenging the dual billing arrangement were set off against the fees he owed Citizens [Bank] under the loan agreement." (A.3397).

reasonable costs of collection of the loan from April 25, 1996, through November 30, 1998 (A.4224). Bishay claims that the note was paid "some time before a substantial part of those legal fees were incurred," and accordingly when the note was paid, the fees incurred thereafter could not constitute reasonable fees for "collection and enforcement" of the note (B.Br.49). Arguing this point for the first time in this appeal (see memorandum in opposition to summary judgment at A.3702-3721), Bishay is not entitled to consideration of that argument in this court. See *Royal Indem. Co. v. Blakely*, 372 Mass. 86, 87-88 (1977).

In any event, Bishay fails to show that the language of the note (A.32), his guarantees (A.40,44,56), or the relevant provisions of the Bankruptcy Court's approval of a lien on his assets (A.280), restricted his contractual obligations after the note was paid. He also fails to show how the fees awarded were not related to litigation arising out of the collection process, or that there was any error in the judge's thorough analysis of the course of this litigation (A.4216-4224).[13] The judge properly concluded that "Bishay vigorously pursued his purported $100 million counterclaim against [Citizens Bank] to no avail, despite his clear contractual obligation to pay . . . collection costs in the event his claim

13. The judge noted that the fees requested represented nearly two thousand hours of work, that Bishay asserted a counterclaim he valued at $100 million, involving complex issues of bankruptcy law, res judicata, contract, and c. 93A, and the filing of over one hundred pleadings. He stated that "every point on every issue was vigorously contested by both parties," and that Citizens Bank ultimately succeeded in obtaining judgment in its favor on Bishay's entire counterclaim (A.4220).

was unsuccessful." (A.4224). Although Citizens Bank's claim with respect to the unpaid loan balance was satisfied on December 27, 1996,[14] because Citizens Bank's complaint and Bishay's counterclaim then were pending in the Superior Court, it cannot be said that the parties had reached an end to all "charges of the holder . . . in connection with the collection and enforcement of [the note]." (A.32). Bishay's counterclaim was grounded in allegations of improper conduct by Citizens Bank in collecting the note, which Bishay not only pressed after the note had been paid, but had he been successful, he essentially would have overturned the validity of Citizens Bank's collection of the note. Citizens Bank incurred additional fees and costs in withstanding Bishay's continuing attack on the validity of its collection of the note, and those fees and costs properly were an integral part of the collection process. Compare *Penney v. First Natl. Bank of Boston*, 385 Mass. 715, 723 (1982) (attorney's fees and costs incurred by bank in defending against debtor's action brought after sale of debtor's collateral "were an integral part of the collection process").[15] See *Leventhal v. Krinsky*, 325 Mass. 336, 342 (1950); *Covich v. Chambers*, 8 Mass. App. Ct. 740, 752 (1979).

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14. The Bankruptcy Court order regarding discharge of debtors states in relevant part: "In accordance with the terms of the Confirmed Plan, all claims of creditors were satisfied in full on December 27, 1996 with the exception of certain legal fees and costs of Citizens Bank. . . ." (A.3070-3071).

15. Bishay no longer challenges the judge's conclusion that Citizens Bank was entitled to $117,765.24 in fees as a prevailing party in connection with its first motion for summary judgment, an amount which was included in the total award (A.4223-4224).

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4. *Costs incurred after judgment and in this appeal.* Citizens Bank requests attorney's fees and costs it claims were allowed in the Superior Court, and to March 17, 1999, when the award was entered (C.B.Br.45-46). Because this request concerns matters beyond our purview in another court, we decline to consider the request. Citizens Bank may, however, request its attorney's fees and costs in connection with this appeal by filing a petition with this court, together with the necessary back-up materials, within fifteen days of the issuance of the rescript in this case. Bishay shall have ten days to respond to that submission, in accordance with *Yorke Mgmt. v. Castro*, 406 Mass. 17, 20 (1989).

Judgments affirmed.

By the Court (Jacobs, Cypher,
& Kantrowitz, JJ.)

s/ Ashley Ahern
Clerk

Entered: October 22, 2002.

APPENDIX B — MEMORANDUM OF DECISION AND ORDER OF THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS DATED FEBRUARY 11, 1998 AND FILED FEBRUARY 17, 1998

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 95-1312A

CITIZENS BANK OF MASSACHUSETTS,

Plaintiff,

vs.

BAHIG BISHAY[1] & others[2],

Defendants.

MEMORANDUM OF DECISION AND ORDER ON PARTIES' CROSS-MOTIONS FOR RECONSIDERATION

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1. Individually and as Trustee of Old Post Realty Trust.

2. Commonwealth Realty Trust, Bishay Motors & Leasing, Inc. f/k/a Bishay Motors, Inc., Massachusetts Auto Group, Ltd., and 1095 Commonwealth Ave. Corp.

Appendix B

INTRODUCTION

The plaintiff, Citizens Bank of Massachusetts (Citizens), brought this action in an attempt to recover more than $1.5 million owed by defendant Bahig Bishay and various trusts and corporations controlled by him under a defaulted promissory note. This debt has since been repaid as a result of a Chapter 11 plan confirmed by the Bankruptcy Court on April 23, 1996. However, numerous counterclaims by Bishay against Citizens remain pending in this action. In a Memorandum of Decision and Order dated November 24, 1997 and filed December 1, 1997, this Court granted Citizens' motion for summary judgment on the vast majority of Bishay's amended counterclaim and denied Bishay's cross-motion for partial summary judgment. This matter is now before the court on the parties' cross-motions for reconsideration pursuant to Super. Ct. R. 9D. For the reasons discussed below, Citizens' motion for reconsideration is *ALLOWED*. Further, the defendants' cross-motion for reconsideration is *DENIED*.

DISCUSSION

I. BISHAY'S MOTION FOR RECONSIDERATION

In its November 24, 1997 Memorandum of Decision and Order, this Court granted Citizens summary judgment on Counts I, II, IV and V of Bishay's amended counterclaim on the ground that the Bankruptcy Court's April 23, 1996 Confirmation Order in the Chapter 11 bankruptcy proceedings constituted res judicata as to those claims. This Court further granted Citizens summary judgment on Count III and

subparts a, b, c, d, e, g, h and i of Count VI of the amended counterclaim on the ground that a valid and binding general release in the parties' September 16, 1994 Forbearance Agreement precluded Bishay from asserting any claims against Citizens arising from the parties' relationship prior to that date.

Bishay now asks this Court to reconsider those rulings, urging this Court to reinstate Count III of the amended counterclaim and to further hold that the broad reservation in the Chapter 11 Reorganization Plan (the Plan) permits the post-bankruptcy litigation of all other counts of the amended counterclaim not affected by the September 16, 1994 release. Bishay first argues that this Court erred in awarding summary judgment on Count III of the amended counterclaim based on the general release in the parties' Forbearance Agreement because the majority of Count III contains allegations of misconduct alleged to have occurred after September 16, 1994.

Bishay overlooks the fact that in determining that Count III was reserved for post-confirmation litigation by the Bankruptcy Court, this Court also determined that any such claim was limited to the allegations as they stood before the Bankruptcy Court when the Plan was confirmed. At that time, Bishay's counterclaim against Citizens in the present Superior Court action alleged in Count I that Citizens breached its duty of good faith and fair dealing by interfering in the FDIC matter and by refusing to subordinate its mortgage on the 1095 Commonwealth Ave. property. Liability for this conduct is barred by the general release in the September 16, 1994 Forbearance Agreement. Bishay has now submitted a

document which he contends was filed by the parties with the Bankruptcy Court on August 26, 1996: a Joint Stipulation of the Parties Relating to Requested Protective Order that Discovery Not Be Had, to which is appended several exhibits, including Bishay's proposed amended counterclaim in this Superior Court action. However, this Court notes that the Chapter 11 plan was confirmed by the Bankruptcy Court some four months earlier, on April 23, 1996; indeed, the joint stipulation relied proffered by Bishay concerns the post-confirmation attorneys fees proceedings.

Thus, to the extent that amended Count III alleges interference with contractual relations that Bishay had with parties other than the FDIC, after September 16, 1994, such claims were not part of Bishay's original complaint, were not before the Bankruptcy Court at the time of confirmation, and were not saved for post-bankruptcy litigation by the reservation in the Confirmation Plan. Accordingly, Citizens is entitled to judgment as a matter of law on Count III of the amended complaint, which this Court declines to reinstate.

Bishay next contends that this Court erred in ruling that the blanket reservation contained in the Plan was insufficient to preserve the remaining four counts of the amended counterclaim for post-confirmation adjudication. This Court concluded that because the reservation failed to expressly identify particular claims or types of actions intended to be preserved, its language[3] was too broad and vague to prevent

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3. The reservation referred to preserve "the debtors' alleged claims against Citizens arising from the transactions between the Debtors and Citizens and related matters (the "Alleged Claims")".

the Confirmation Order from constituting res judicata as to all claims other than the two specific claims pending in Superior Court at the time of confirmation. Bishay contends that this Court improperly relied on Illinois and New York cases in concluding that a reservation of a debtor's right to pursue rights and remedies outside of the bankruptcy proceeding must specifically identify or refer to the cause of action intended to be reserved. Citing *Apparel Art International, Inc. v. Amertex Enterprises*, 48 F.3d 576 (1st Cir. 1995), Bishay argues that Massachusetts law interprets the "express" nature of a reservation more broadly than other jurisdictions and does not require identification of the particular claims reserved for later adjudication.

In *Apparel Art International Inc.*, the plaintiff subcontractor, who had been awarded $387,994 against the defendant contractor during arbitration before the AAA, filed an action in U.S. District Court (Suit #1) to enforce the arbitration award pursuant to the Federal Arbitration Act. 48 F.3d at 579. After confirming the award and entering judgment in plaintiff's favor, the court permitted the plaintiff to conduct post-judgment discovery in supplemental proceedings so that it could execute its judgment. During said discovery, the plaintiff learned of numerous asset transfers by the defendant to a company which the plaintiff believed had been created to defraud the defendant's creditors. *Id.* While these proceedings were ongoing, the plaintiff filed a separate suit in U.S. District Court (Suit #2) alleging RICO, fraudulent conveyance and alter ego claims against the defendant. *Id.* at 580. The District Court dismissed the fraudulent conveyance and related claims, stating:

> Essentially, the fraudulent transfer claim is merely one aspect of plaintiff's attempt at collection of the judgment issued in (Suit #1]. Since plaintiff has already begun that process in (Suit #1], we cannot entertain these claims again here without a real risk of allowing multiple judgments to issue for the same harm . . . The dismissal is without prejudice to any legitimate execution of judgment motions which the plaintiff may seek to file [in the supplementary proceedings in Case #1]. *Id.* at 586.

In concluding that the plaintiff could assert claims for fraudulent conveyance, depletion of corporate assets, and alter ego in the supplementary proceedings, the First Circuit held that Suit #2 did not bar such claims under the doctrine of res judicata because the District Court in Suit #2 had expressly reserved the plaintiff's right to litigate those claims in a later action. *Id.*

Bishay's argument that *Apparel Art International, Inc.* demonstrates that the First Circuit requires a less specific reservation than other jurisdictions in order to exempt a claim from the application of res judicata is simply without merit. The District Court's reservation of "any legitimate execution of judgment motions which the plaintiff may seek to file [in the supplementary proceedings in Case #1]" specifically identified the claims which were reserved: those relating to the defendant's attempt to avoid the arbitration judgment. The First Circuit did not interpret the reservation broadly, as Bishay seeks to do here, to preserve any claim the plaintiff might have against the defendant arising out of their

contractual relationship. Rather, the claims the plaintiff was allowed to bring in the supplemental proceeding were the very ones pending before the District Court when it made the reservation. Thus, the holding in *Apparel Art International, Inc.* is consistent with those cases in other jurisdictions rejecting blanket reservations in bankruptcy confirmation plans and requiring that the claims to be reserved for later adjudication be expressly identified. Accordingly, this Court declines to alter its ruling that the language in the Plan permitting Bishay and 1095 Commonwealth Ave. Corp. to assert "their alleged claims against Citizens arising from the transactions between the Debtors and Citizens and related matters" reserved only the two claims pending in Superior Court at the time of the reservation, and failed to specifically reserve the additional claims later asserted in Bishay's amended complaint. Bishay's motion for reconsideration is therefore *DENIED*.

II. CITIZENS' MOTION FOR RECONSIDERATION

Citizens urges this Court to reconsider its denial of summary judgment on subparts f, j, k, l and m of Count VI, asserting that although such claims were not encompassed in the parties' general release, they are nonetheless barred by principles of either res judicata or absolute privilege. Subpart j of Bishay's amended counterclaim alleges that Citizens violated Chapter 93A by causing a false independent appraisal of the 1095 Commonwealth Avenue property. Subpart f alleges that Citizens violated Chapter 93A by attempting to collect reimbursement for legal fees under the dual billing agreement with its counsel, Brown, Rudnick, Freed & Gesmer. Subpart k further alleges that Citizens

violated Chapter 93A by entering into the dual billing agreement, and by submitting false time entries and a false fee petition to the Bankruptcy Court. Citizens contends that these three claims are barred by the res judicata effect of the Bankruptcy Court's January 21, 1997 decision awarding attorney's fees pursuant to 11 U.S.C. § 506(b).

In that decision, the Bankruptcy Court addressed the impropriety of the appraisal at issue as follows:

> Debtors cite "impropriety in the preparation and use of the appraisals, as demonstrated by the testimony elicited at the evidentiary hearing held on April 18, 1996." The Court has reviewed the testimony from that hearing. The testimony on appraisal issues was lengthy and touched on a number of distinct appraisal-related issues; and it pertained to only one of the ten appraisals for which compensation is now being sought. The Debtors do not identify or cite the specific testimony on which they rely. They offer no argument as to why the alleged improprieties warrant denial of the appraisal fees. Nor do they even identify the improprieties they have in mind. In short, the Debtors have not articulated this objection in sufficient detail to permit either Citizens or the Court to understand, respond to, and adjudicate the substance of their objection. The compensation sought for these appraisals is reasonable and will be allowed in the amount requested.

Appendix B

Given the extensive hearing held by the Bankruptcy Court on the issue of the allegedly improper appraisal, that court's determination that Bishay had failed to clearly articulate a basis on which the court could find said appraisal to be wrongful, and the court's award of the appraisal fee to Citizens, this Court concludes that Bishay is barred from now relitigating the propriety of the appraisal fee in the form of an action under Chapter 93A. Accordingly, Citizens is correct that the doctrine of res judicata entitles it to judgment as a matter of law on subpart j on Count VI.

With respect to subparts f and k, the Bankruptcy Court noted in its decision that in opposing Citizens' application for fees, "the Debtors argue that the dual billing system violates all notions of good faith and fair dealing and constitutes an unfair and deceptive practice in violation of Massachusetts G. L. c. 93A." The Court ultimately concluded that the dual billing agreement, properly construed, was not illegal or void as against public policy; that with the exception of one of its attorneys, Citizens did not intentionally misrepresent or conceal the dual fee agreement; and that the appropriate sanction for Citizens' misconduct was to award Bishay his attorneys' fees in pursuing the issue. The Bankruptcy Court did not, however, address whether Citizens' conduct with respect to the fee agreement constituted a violation of Chapter 93A so as to affirmatively entitle Bishay to damages under that statute. Rather, the court merely rejected the argument that Citizens' conduct was so egregious as to warrant a total denial of attorneys' fees under the promissory notes. Moreover, this Court cannot conclude that the Chapter 93A issue was logically or practically necessary to the Bankruptcy Court's fee decision, as the court could have decided that

regardless of whether Citizens' conduct constituted a Chapter 93A violation under state law, a balancing of the equities required that citizens be allowed to recover some of its fees. Thus, this Court declines to hold that the issue of Citizens' Chapter 93A liability was implicitly determined by the Bankruptcy Court's January 21, 1997 Order so as to bar litigation of said claim in the present action based on res judicata.[4]

Nonetheless, Citizens' contends that its conduct with respect to the dual billing agreement was privileged. Massachusetts has long recognized that statements or other communications made by parties, counsel or witnesses in the institution or conduct of litigation are absolutely privileged, even when made maliciously or in bad faith, provided such statements relate to the judicial proceeding. *Theran v. Rokoff*, 413 Mass. 590, 591 (1992); *Sullivan v. Birmingham*, 11 Mass. App. Ct. 359, 361 (1981); *Doe v. Nutter, McClennan & Fish*, 41 Mass. App. Ct. 137, 140, rev. den., 423 Mass. 1111 (1996). Moreover, the privilege attached to such statements provides a complete defense not only to a defamation suit but to all theories of civil liability based thereon. *Sullivan v. Birmingham*, *supra* at 368; *Doe v. Nutter, McClennan & Fish*, *supra* at 140. Subpart f of Bishay's amended counterclaim alleges that Citizens violated Chapter 93A by attempting to collect reimbursement for legal fees under the dual billing agreement with its

4. It should be noted that because Bishay's claim with respect to the dual fee agreement is based on post-confirmation conduct and did not exist at the time of the confirmation proceedings, the scope of the reservation in the confirmation plan is not at issue here.

counsel, Brown, Rudnick, Freed & Gesmer. Subpart k further alleges that Citizens violated Chapter 93A by entering into the dual billing agreement, submitting false time entries to the Bankruptcy Court and submitting a false fee petition to the Bankruptcy Court. Insofar as Subpart k is based on the written and oral statements made by Citizens in the Bankruptcy Court fee proceeding, such statements cannot form the basis of civil liability. However, the bulk of Subparts f and k are based on Citizens' conduct in entering into a dual billing agreement with its attorney and then attempting to collect from debtors such as Bishay a higher billing rate than the bank itself would have to pay for the same work. These claims do not involve statements or communications made in the course of litigation and are thus not privileged. Massachusetts does not recognize the broad immunity for all actions taken by participants in the litigation process urged by Citizens.

The question then becomes whether Citizens' conduct with respect to the dual billing agreement can form the substantive basis of a Chapter 93A claim. While it is clear that abuse of process may violate Chapter 93A, Bishay cannot demonstrate such a claim in the present case. *Datacomm Interface, Inc. v. Computerworld, Inc.*, 396 Mass. 760, 777-779 (1986). Abuse of process presupposes the use of legal action for an ulterior purpose: to achieve some end other than the apparent end of the litigation process which has been initiated. *Id.* at 775-776: *Silvia v. Building Inspector of West Bridgewater*, 35 Mass. App. Ct. 451, 453, rev. den., 416 Mass. 1104 (1993). Irrespective of the propriety or impropriety of the dual billing agreement, Citizens ad no purpose in petitioning the Bankruptcy Court for fees other

than the asserted desire to collect attorney's fees under that agreement. Nonetheless, even where the institution of litigation does not constitute an abuse of process it may, in certain circumstances, constitute an unfair or deceptive practice for purposes of Chapter 93A. See *Schubach v. Household Finance Corp.*, 375 Mass. 133, 137 (1978) (holding that a company's conduct in filing collection suits in distant venues to increase the chances of obtaining default judgments could be unfair for purposes of Chapter 93A although it was permitted by the venue provisions of G.L. c. 233, § 2 and was not an abuse of process). Bishay has a colorable claim that the mere entering into of the dual billing agreement and attempt to enforce it against creditors could be deemed an unfair and deceptive act. See *Guenard v. Burke*, 387 Mass. 802, 809 (1982) (holding that an attorney's use of a contingent fee agreement in a divorce case was an unfair and deceptive practice where although the agreement was ultimately not enforced against the plaintiff, the attorney relied on the agreement to retain one third of plaintiff's recovery).

Finally, although the court in awarding actual damages under Chapter 93A must take into account that Bishay has already been compensated for those attorney's fees incurred in resisting the dual billing agreement in the Bankruptcy Court, if the court finds a knowing and wilful violation of Chapter 93A, it is arguable, but this Court does not now rule, that fees from that proceeding could be the basis of multiple damages. See *Datacomm Interface, Inc. v. Computerworld, Inc.*, *supra* at 780 (1986) (holding that where attorney's fees constitute a party's actual damages, as in an abuse of process claim, they may be multiplied under c. 93A). See also *Cohen*

v. Liberty Mutual Insurance Co., 41 Mass. App. Ct. 748, 753 (1996) (discussing the 1989 amendment to c. 93A, § 9(3) which provides that the amount of actual damages to be multiplied is the amount of the judgment on all claims arising out of the same and underlying transaction or occurrence, regardless of the existence of insurance coverage available in payment of the claim). Moreover, in the absence of other actual damages, Bishay would be entitled to recover statutory damages of twenty-five dollars. See *Brow v. Stanton*, 12 Mass. App. Ct. 992, 993 (1981); *Knott v. Laythe*, 42 Mass. App. Ct. 908, 910 (1997). Accordingly, this Court concludes that Citizens is not entitled to summary judgment on subparts f and k of Count VI of Bishay's amended counterclaim.

Finally, Subpart 1 of Count VI alleges that Citizens violated Chapter 93A by repeatedly petitioning the Court for authority to sell Bishay's antique car collection, while Subpart m alleges that Citizens violated Chapter 93A by filing the present law suit, by alleging under oath that Bishay owed $2,568,000, and by failing to disclose that part of the debt had been repaid. Citizens' conduct in alleging in its complaint that Bishay owed a particular amount under the promissory notes involves statements made in the institution of litigation which are absolutely privileged and cannot form the basis for liability under Chapter 93A. However, to the extent that Subpart m alleges that the filing of the complaint itself and petitioning of the Court to liquidate Bishay's collateral violate c. 93A, the litigation privilege would not bar an action on theories of malicious prosecution or abuse of process. See *Sullivan v. Birmingham*, *supra* at 367 n.8. Nonetheless, based on the summary judgment record, Bishay has no reasonable expectation of demonstrating at trial a Chapter

93A violation under these theories. As noted above, abuse of process presupposes the use of legal action for an ulterior or improper purpose. *Silvia v. Building Inspector of West Bridgewater*, *supra* at 453. Similarly, malicious prosecution involves perverse use of the litigation process in the sense that the defendant lacked probable cause to institute the criminal or civil action at issue. *Id.* at 453-454. Given the size of the debt owed by Bishay, his pattern of default on the parties' various forbearance agreements, and his general lack of cooperation in resolving the debt, Citizens' filing of the present action was justified and for the proper purpose of collecting the money owed. Accordingly, this Court concludes that Bishay has no viable ground for the Chapter 93A claims alleged in Subparts l and m of Count VI, entitling Citizens to judgment as a matter of law.

Appendix B

ORDER

For the foregoing reasons, it is hereby *ORDERED* that Citizens' motion for reconsideration be *ALLOWED*. Upon reconsideration, it is *ORDERED* that Citizens' motion for summary judgment be *ALLOWED* as to Subsections j, l and m of Count VI of the amended counterclaim, but *DENIED* as to Subsections f and k of that Count. It is further *ORDERED* that the defendants' motion for reconsideration be *DENIED*.

s/ Gordon L. Doerfer
Gordon L. Doerfer
Justice of the Superior Curt

DATED: February 11, 1998

APPENDIX C — MEMORANDUM OF DECISION AND ORDER OF THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS DATED OCTOBER 16, 1998 AND FILED OCTOBER 21, 1998

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 95-1312A

CITIZENS BANK OF MASSACHUSETTS,

Plaintiff,

vs.

BAHIG BISHAY[1] & others[2],

Defendants.

MEMORANDUM OF DECISION AND ORDER ON PARTIES' RENEWED CROSS-MOTIONS FOR RECONSIDERATION

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1. Individually and as Trustee of Old Post Realty Trust.

2. Commonwealth Realty Trust, Bishay Motors & Leasing, Inc. f/k/a Bishay Motors, Inc., Massachusetts Auto Group, Ltd., and 1095 Commonwealth Ave. Corp.

Appendix C

INTRODUCTION

This action originated with a complaint by plaintiff, Citizens Bank of Massachusetts (Citizens), seeking to recover more than $1.5 million owed by defendant Bahig Bishay and various trusts and corporations controlled by him under a defaulted promissory note. That debt was repaid as a result of a Chapter 11 plan confirmed by the Bankruptcy Court on April 23, 1996. However, numerous counterclaims by Bishay against Citizens remained pending in this case. In a Memorandum of Decision and Order dated November 24, 1997, this Court granted Citizens' summary judgment on Counts I, II, IV and V of Bishay's amended counterclaim on the ground that the Confirmation Order entered in the Chapter 11 bankruptcy proceedings constituted res judicata as to those claims. The Court further granted Citizens summary judgment on Count III and subsections a, b, c, d, e, g, h and i of Count VI of the amended counterclaim on the ground that a valid and binding general release in the parties' September 16, 1994 Forbearance Agreement precluded Bishay from asserting any claims against Citizens arising from the parties' relationship prior to that date. Finally, this Court denied Bishay's cross-motion for summary judgment.

Thereafter, both parties moved this Court for reconsideration of that summary judgment decision. In a Memorandum of Decision and Order dated February 11, 1996, this Court granted Citizens' motion for summary judgment as to Subsections j, l and m of Count VI of the amended counterclaim, on the ground that such claims were based on written and oral statements made to the Bankruptcy Court which were privileged and could not form the basis of

civil liability.[3] However, this Court denied the motion as to Subsections f and k of Count VI on the ground that Citizens' entering into the improper dual billing agreement with its attorney and then attempting to collect from debtors such as Bishay a higher billing rate than the bank itself would have to pay could constitute unfair and deceptive practices under Chapter 93A.

With respect to Bishay's cross-motion for reconsideration this Court denied Bishay's request to reinstate Count III of the amended counterclaim. In addition, this Court denied Bishay's request that the court reverse its interpretation of the reservation in the Chapter 11 Reorganization Plan and hold that the reservation permits the post-bankruptcy litigation of all other counts of the amended counterclaim not affected by the September 16, 1994 release.

This matter is again before this Court because in August of 1998, the parties filed renewed cross-motions for reconsideration pursuant to Super. Ct. R. 9D. For the reasons discussed below, Citizens' renewed motion for reconsideration is *ALLOWED*. Further, the defendants' renewed cross-motion for reconsideration is *DENIED*.

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3. This Court further found that to the extent that the filing of the complaint, the petitions to liquidate Bishay's collateral, and the attorney's fees were not privileged, they nonetheless did not support a Chapter 93A claim based on abuse of process because Bishay had presented no evidence of an improper or ulterior motive for such acts.

Appendix C

DISCUSSION

I. BISHAY'S RENEWED MOTION FOR RECONSIDERATION

Bishay asks this Court to rescind its previous order that the reservation clause in the Chapter 11 plan was insufficient to preserve his counterclaims for post-bankruptcy litigation, and to reinstate Counts I, II, III, IV, V and subsection j of Count VI of the amended counterclaim. Bishay further asks this Court to find that he can state a claim for abuse of process and accordingly, reinstate subsections j, l and m of Count VI. In connection with these matters, Bishay urges this Court to examine the contents of a sealed envelope, containing supplemental answers to interrogatories dated September 30, 1997, which was filed in connection with Bishay's original summary judgment motion but which was apparently placed directly in the impound safe without ever being reviewed by this Court. In the interests of justice, this Court has examined the contents of the envelope to determine whether any information contained therein warrants reconsideration of the November 24, 1997 and February 11, 1996 Memoranda of Decision and Order.

This Court carefully considered the proper scope of the reservation in the Chapter 11 plan not only in the initial summary judgment decision but also, in even greater detail, on Bishay's first motion for reconsideration. That issue having been decided adversely to him on two prior occasions, Bishay now asks this Court yet again to adopt his interpretation of the reservation. This the court declines to do. Where there has been no material change in circumstances,

a court is not bound to reconsider a case, issue, or question of law once decided. *Peterson v. Hopson*, 306 Mass. 597, 599 (1940); *King v. Globe Newspaper Co.*, 400 Mass. 705, 707, cert. den., 485 U.S. 940 (1987). Although the court has the power prior to final judgment to reconsider an interlocutory ruling, such power should be exercised only where there are compelling reasons to do so, and a judge should hesitate to undo his own work. *Peterson v. Hopson*, *supra* at 603; *King v. Globe Newspaper Co.*, *supra* at 707-708. There is simply no valid reason for this Court to revisit the legal question of the proper scope of the reservation and indeed, considerations of judicial economy militate against such action. Compare *Hurley v. Berkshire Design Group*, Civil No. 92-3275B (Mass. Super. Ct. April 26, 1994) (Toomey, J.); *Flores v. Metropolitan Dist. Com'n*, Civil No. 92-4265 (Mass. Super. Ct. March 9, 1995) (McDaniel, J.); (allowing motions for reconsideration based on new case law not existing at the time of the prior summary judgment motions).

In addition, Bishay contends, for the first time, that the confirmation of the Chapter 11 plan does not constitute res judicata as to his counterclaims against Citizens because said claims were "non-core" to the bankruptcy proceeding and thus could not have been adjudicated in that forum. Bishay never even intimated this argument in either the original motion for summary or the first motion for reconsideration. Following a decision of this Court, a party has no right to a rehearing, and a question of law not seasonably raised cannot be revived by the simple expedient of bringing it forward and demanding a second ruling. *Peterson v. Hopson*, *supra* at 599-600. See also *Diversified Mortgage Investors v. Viking*

General Corp., 16 Mass. App. Ct. 142, 151 (1983). This Court will not now entertain Bishay's "non-core" argument, given his failure to raise the issue in connection with either the original summary judgment or the cross-motions for reconsideration.[4] Accordingly, this Court declines to consider the merits of Bishay's claims in his renewed motion for reconsideration or to reinstate Counts I, II, III, IV, V and subsection j of count VI of the amended counterclaim.

Finally, Bishay asks this Court to reconsider its determination that he failed to demonstrate some ulterior motive for Citizens' legal efforts to collect on the defaulted loan, which would raise a genuine issue of fact with respect to an abuse of process claim. Bishay asserts that information revealed in the June 1998 deposition of Citizens Financial Group Chairman Larry Fish[5] supplies an ulterior motive, such that subsections j, 1 and m of Count VI should be reinstated. Further, according to Bishay, "important discovery concerning the profit that Citizens-could make from foreclosure on the Bishay loans was only produced by Citizens on August 27, 1998." Bishay does not explain why he was unable to muster this information in support of either the original motion for summary judgment or his motion for

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4. This Court notes that following its decision on the parties' cross-motions for reconsideration, Bishay filed with the Bankruptcy Court a "Motion to Clarify and Amend the Reservation Clause in the April 23, 1996 Confirmed Plan of Reorganization, Nunc Pro Tunc, And Declare That the Alleged Claims of the Debtor Are Non-Core." The Bankruptcy Court denied this motion, and Bishay's appeal to the Bankruptcy Appellate Panel of the First Circuit is now pending.

5. Until 1997, Fish was also a Director of Citizens Bank.

reconsideration. The docket does not reflect that Bishay ever moved pursuant to Mass. R. Civ. P. 56(f) for additional time to conduct discovery necessary to oppose Citizens' motion for summary judgment. This Court does not consider the belated presentation of Fish's testimony to be a material change in circumstances warranting a reconsideration of the claims at issue.[6] Accordingly, Bishay's renewed motion for reconsideration is *DENIED* in all respects.[7]

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6. Moreover, an examination of the merits reveals that Fish's testimony is inadequate to establish the ulterior motive required to prevail on an abuse of process claim. Fish states in his deposition that hundreds of Citizens Bank employees were on an incentified pay plan tied to the performance of the bank. Although Fish agreed that employees in the special assets group would qualify for participation in the pay plan, he stated that he lacked any knowledge as to whether particular members of the assets group actually received incentive pay. Finally, he admitted that for members of the special asset group on the incentified pay plan, the quality of the assets held by the bank, including loans collected, would affect the incentive pay received. Bishay's theory is that Citizens' actions with respect to his loan were driven by employees' ulterior motive of obtaining "secret incentive bonuses," because the more fees and expenses the Bank recovered in connection with Bishay's loan, the bigger the bonuses for employees. Insofar as all loan collection proceedings seek to recover money, the desire to increase the bank's wealth cannot constitute an ulterior motive. Further, Bishay has failed to produce any evidence that the individuals involved in handling his loan in fact received any incentive pay connected therewith.

7. Needless to say, this Court also denies Bishay's requests, contained in his opposition to Citizens' renewed motion for reconsideration, to allow him leave to amend his counterclaim to include a separate count for abuse of process, and to grant further discovery pursuant to Mass. R. Civ. P. 56(f).

Appendix C

II. CITIZENS' MOTION FOR RECONSIDERATION

Citizens now urges this Court to reconsider its denial of summary judgment on Bishay's remaining claims, subsections f and k of Count VI, on the ground that Bishay has no reasonable expectation of proving actual damages under Chapter 93A. While Citizens did not argue the absence of Chapter 93A damages in either its original summary judgment motion or motion for consideration, this is not a case of a party seeking a further hearing on an argument unseasonably raised as a mere afterthought. Rather, in sparing subsections f and k of Count VI from summary judgment, this Court, without input from either party, raised the issue of damages, noting that while any award of actual damages under Chapter 93A would have to account for the fact that Bishay had already been compensated for the attorney's fees incurred in resisting the dual billing agreement in the Bankruptcy Court, Bishay might conceivably be able to establish damages beyond those attorney's fees.

Accordingly, because this Court *sua sponte* raised the issue of Bishay's ability to prove Chapter 93A damages, it is valid for citizens in response to now seek to present evidence on this issue. Further, given that the only cause of action remaining in this case is a Chapter 93A claim based on two narrow grounds, it is in the interests of judicial economy to consider the possible resolution of the claim on summary judgment. In doing so, this Court notes that both Citizens and Bishay have extensively briefed the issue of Chapter 93A damages in connection with the present motion.

Appendix C

To prevail on a claim under Chapter 93A, section 11, a plaintiff must have suffered a "loss of money or property." G.L. c. 93A, § 11 (1989). In this context, "money" means money, not time, and "property" means the kind of property that is purchased or leased, not such intangibles as a right to sense of security or peace of mind. *Halper v. Demeter*, 34 Mass. App. Ct. 299, 304 (1993). Where the plaintiff fails to satisfy his burden of proving that he suffered some loss of money or property within the meaning of G.L. c. 93A, § 11, summary judgment is appropriate. See *Lumbermens Mutual Casualty Co. v. Offices Unlimited, Inc.*, 419 Mass. 462, 468-469 (1995) (stating that where no judgment entered against the plaintiff, who therefore never paid out any loss, plaintiff failed to establish damages from insurer's disclaimer of coverage).

In the present case, Bishay challenged the dual billing arrangement in the Bankruptcy Court prior to that court's awarding Citizens any attorneys fees. After an extensive evidentiary hearing, the amount of fees owed by Bishay was reduced to reflect the amount Citizens itself would have paid its attorneys for the work. Moreover, the attorney's fees and expenses Bishay incurred in challenging the dual billing arrangement were set off against the fees he owed Citizens under the loan agreement. Thus, Bishay never expended any money out of his pocket as a result of the existence and attempted enforcement of Citizens' dual billing arrangement. Compare *Guenard v. Burke*, 387 Mass. 802, 809-810 (1982) (concluding that where attorney unfairly withheld funds from a client under an illegal fee agreement, c. 93A damages were the difference between the withheld funds and the reasonable

fee owed the attorney); *Doucette v. Kwait*, 392 Mass. 915, 916-917 (1984) (concluding that where attorney wrongfully charged a separate fee for services that should have been included under the contingent fee already paid by the client, c. 93A damages were the amount of that fee and interest thereon).

Nonetheless, in his answers to interrogatories, Bishay claims $100,000,000 in damages from Citizens' unfair and deceptive practices, which he proceeds to itemize. In addition, he has introduced the affidavit of Howard Gordon, an expert specializing in business valuation and business damages calculations, stating that Bishay's various businesses sustained losses in excess of 90 million dollars due to Citizens' wrongful actions. Bishay seeks to recover these damages in connection with his remaining Chapter 93A claims on the theory that because Citizens wanted to collect excessive fees under the improper dual billing arrangement, it refused repayment of Bishay's loan in November of 1995 and refused to release the collateral for the loan, preventing Bishay from undertaking various business opportunities, forcing him into bankruptcy, and resulting in $10,000 in costs in the bankruptcy proceedings and lost business profits of $94,000,000.

It is well established that in the absence of a causal relationship between the alleged unfair acts and the claimed loss, there can be no recovery under G.L. c. 93A, § 11. *Massachusetts Farm Bureau Federation, Inc. v. Blue Cross of Massachusetts, Inc.*, 403 Mass. 722, 730 (1989). On the record before this Court, Bishay has no reasonable

expectation of demonstrating that the millions of dollars of damages he alleges were caused by Citizens' entry into and attempted enforcement of the dual billing arrangement at issue. Accordingly, this Court concludes that Citizens is entitled to summary judgment on Subparts f and k of Count VI of Bishay's amended counterclaim.

Appendix C

ORDER

For the foregoing reasons, it is hereby *ORDERED* that Citizen Bank's renewed motion for reconsideration be *ALLOWED*. Upon reconsideration, it is *ORDERED* that Citizen Bank's motion for summary judgment on the remainder of Count VI of the amended counterclaim be *ALLOWED*.

It is further *ORDERED* that the defendants' renewed motion for reconsideration be *DENIED*.

s/ Gordon L. Doerfer
Gordon L. Doerfer
Justice of the Superior Curt

DATED: October 16, 1998

APPENDIX D — MEMORANDUM OF DECISION AND ORDER OF THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS DATED MARCH 17, 1999 AND FILED MARCH 18, 1999

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 95-1312A

CITIZENS BANK OF MASSACHUSETTS,

Plaintiff,

vs.

BAHIG BISHAY[1] & others[2],

Defendants.

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR AWARD OF COLLECTION COSTS AND DEFENDANTS' CROSS-MOTION FOR ENTRY OF SEPARATE JUDGMENT

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1. Individually and as Trustee of Old Post Realty Trust.

2. Commonwealth Realty Trust, Bishay Motors & Leasing, Inc. f/k/a Bishay Motors, Inc., Massachusetts Auto Group, Ltd., and 1095 Commonwealth Ave. Corp.

Appendix D

INTRODUCTION

This action originated with a complaint by plaintiff, Citizens Bank of Massachusetts (Citizens) , seeking to recover more than $1.5 million owed by defendant Bahig Bishay and various trusts and corporations controlled by him under a defaulted promissory note. That debt was repaid as a result of a Chapter 11 plan confirmed by the Bankruptcy Court on April 23, 1996. However, numerous counterclaims by Bishay against Citizens remained pending in this case. As a result of three separate Memoranda of Decision and Order, dated November 24, 1997; February 11, 1998; and October 16, 1998 respectively, this Court granted Citizens summary judgment on all of Bishay's counterclaims.

This matter is now before the court on Citizens' motion for approval of an award of attorneys fees and costs, pursuant to the original loan documents, incurred in defending against Bishay's counterclaim. Bishay has filed a cross-motion seeking entry of separate and final judgment on his counterclaim pursuant to Mass. R. Civ. P. 54 (b) and a stay of Citizens' motion for an award of fees and costs. For the reasons discussed below, the defendants' motion for entry of separate judgment is *DENIED*. In addition, Citizens' motion for an award of costs is *ALLOWED*.

Appendix D

DISCUSSION

I. SEPARATE AND FINAL JUDGMENT ON BISHAY'S COUNTERCLAIM

This Court will first address Bishay's motion for entry of separate and final judgment on his counterclaim and a stay of all action on Citizens' motion for costs pending his appeal of the summary judgment in Citizens' favor. Massachusetts Rule of Civil Procedure 54(b) provides in relevant part:

> When more than one claim for relief is presented in an action . . . the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties. Mass. R. Civ. P. 5a(b).

The grant of a certificate directing entry of final judgment on fewer than all the claims in an action presents a matter for the sound discretion of the trial judge. *Acme Engineering*

& Manufacturing Corp. v. Airadyne Co., Inc., 9 Mass. App. Ct. 762, 764 (1980); *United States Trust Co. of New York v. Herriott*, 10 Mass. App. Ct. 313, 321 (1980). However, judicial discretion under Rule 54 (b) should not be exercised routinely or as a courtesy or accommodation to counsel. *Acme Engineering & Manufacturing Corp. v. Airadyne Co., Inc., supra* at 765; *United States Trust Co. of New York v. Heriott, supra* at 322; *High-tech Sales, Inc. v. Olektron Corp.*, 31 Mass. App. Ct. 912, 913 (1991). Rather, in determining that there is no just reason for delay, the court should consider the possible hardship or injustice to the parties from delay of the partial appeal, the interests of sound judicial administration, and whether appellate resolution of the separated matter will simplify, shorten or expedite trial of any of the remaining claims. *Dattoli v. Hale Hospital*, 400 Mass. 175, 177 (1987); *Paris v. Snappy Car Rental Inc.*, 18 Mass. App. Ct. 968, 968-969 (1984).

Accordingly, a certificate of separate and final judgment should be entered only where, after balancing the competing factors, the trial judge can say with assurance based on the facts in the record that finality of judgment should be ordered to advance the interests of sound judicial administration and to prevent the danger of hardship or injustice posed by delay. *U.S. Trust Co. of New York v. Herriott, supra* at 322. The preferred practice is to withhold judgment until all claims have been disposed of. *Acme Engineering & Manufacturing Corp. v. Airadyne Co., Inc., supra* at 764.

In the present case, Citizens' original complaint has been mooted by its recovery in the Chapter 11 proceedings and Citizens has received summary judgment on Bishay's

counterclaim in its entirety. Accordingly, the only aspect of this case which remains is the assessment, pursuant to the loan documents, of collection costs which Citizens is entitled to recover in light of the failure of Bishay's counterclaim. This is not a case where, objectively evaluated, there is little likelihood of recovery on a remaining claim which was asserted as a mere afterthought, so as to support the entry of separate and final judgment. Compare *Acme Engineering & Manufacturing Corp. v. Airadyne Co., Inc., supra* at 765 (concluding that entry of separate judgment was proper where remaining claims were marginal, poorly supported by the evidence, and the likelihood of success was speculative). Rather, Citizen's claim for assessment of collection costs is an integral aspect of the litigation of Bishay's counterclaim. This Court therefore concludes that a delay in the entry of judgment poses no danger of hardship or injustice. Finally, the interests of sound judicial administration militate against separate and final judgment in this case, for if Bishay loses an appeal on the merits of his counterclaim, he will inevitably file a second appeal with respect to any award of collection costs. See *Tiffany v. Sturbridge Camping Clubs, Inc.*, 32 Mass. App. Ct. 173, 178 (1992) (stating that entry of separate judgment neither achieves economy nor avoids hardship where essential facts underlie all of the claims in the case, which involve the same two parties). The usual requirement that all claims be adjudicated prior to entry of judgment exists to avoid piecemeal appeals. *Shawmut Community Bank, N.A. v. Zagami*, 419 Mass. 220, 225 (1994). Thus, this Court declines in its discretion to certify the entry of separate and final judgment on Bishay's counterclaim in this case.

Appendix D

II. CITIZENS' MOTION FOR APPROVAL OF AWARD OF COLLECTION COSTS

Citizens now seeks an award of attorneys fees and costs in the amount of $360,614.63 incurred through November 30, 1998 in defending against Bishay's unsuccessful counterclaim. The original promissory note dated June 8, 1988 provided:

> The maker agrees to pay all charges of the holder hereof in connection with the collection and enforcement of this Note, including reasonable attorneys' fees.

Similarly, Bishay's guaranty of the note provided:

> Guarantor agrees to pay a reasonable attorney's fee and all other costs and expenses which may be incurred by Lender in the enforcement of Borrower's obligation or [sic] this Guaranty or both.

The September 16, 1994 Forbearance Agreement signed by Bishay also provided that he would pay the legal fees and expenses incurred by Citizens in connection with the Note.

In confirming Bishay's Chapter 11 Plan, the Bankruptcy Court (Keener, J.) concluded:

> Citizens is entitled under its loan documents, specifically Plaintiff's Exhibit 6, to retain its liens on all assets until all of its claims are fully

> satisfied. Citizens' claims include not only principal, interest, costs and attorneys' fees accrued to date but future contingent costs in connection with the debtor's state court counterclaims against Citizens Bank.

The Confirmed Plan thus provides that:

> until Citizens actually receives (in form and substance reasonably acceptable to it) a release from (and evidence of dismissal with prejudice of) all Alleged Claims, Citizens shall retain its lien on all Estate Assets not disposed of in accordance with this Plan as security for Citizens' contractual right to reimbursement from the Debtors for Citizens' costs and anticipated costs of defending the Alleged Claims.

On January 22, 1998, Citizens and Bishay agreed to replace the $500,000 lien on Bishay's assets with an irrevocable Letter of Credit issued by Ocean Bank of Miami, Florida.

A. *NECESSITY OF A HEARING*

As a threshold matter, Bishay seeks an evidentiary hearing on the matter of Citizens' collection costs. With respect to an award of fees or costs, "a losing party who seeks to challenge factual issues raised by the affidavits and vouchers of the prevailing party must have an opportunity to be heard." *Waldman v. American Honda Motor Co.*, 413 Mass. 320, 328 (1992). See also *Boynton v. Tarbell*, 272 Mass. 142, 146 (1930) (probate court award of attorney's

fees against estate); *In re Matter of a Grand Jury Subpoena*, 411 Mass. 489, 501 (1992) (court's discretionary award of expense reimbursement to recipient of subpoena duces tecum); *J.P. Construction Co., Inc. v. Stateside Builders, Inc.*, 45 Mass. App. Ct. 920, 920 (1998) (award of attorney's fees under G.L. c. 149, § 29).

Under Massachusetts law, where one party contracts to pay the other's attorney's fees, the standard for recovery is fair and reasonable compensation for the services rendered. *Margolies v. Hopkins*, 401 Mass. 88, 93 (1987); *MIF Realty, L.P. v. Fineberg*, 989 F. Supp. 400, 402 (D. Mass. 1998). The court should consider time expended, customary hourly charges, the attorney's reputation, the demand for his services, the stakes involved in the case, the results secured, and the customary charges for similar services by others. *Cummings v. National Shawmut Bank of Boston*, 284 Mass. 563, 565 (1934); *Margolies v. Hopkins*, *supra* at 93. The documents in the present case explicitly require the fees recovered by Citizens to be reasonable.

A review of the record reveals that Bishay's brief has failed to sufficiently challenge Citizens' affidavits and vouchers to raise a factual issue which would necessitate a hearing. In demanding a hearing, Bishay does not contend that the number of hours spent on the litigation or the rate charged are unreasonable, issues that might require testimony beyond the parties' written submissions. Rather, his only specific objections to the fees are that he should not have to pay the $117,765.24 incurred in connection with Citizens' first summary judgment motion, which largely failed, or fees incurred in resisting Bishay's June 12, 1997 motion to

compel, which was granted. In addition, he contends that the Stoll affidavit claims entitlement to fees Citizens was not obligated to pay by contract. These legitimate concerns can be adequately and fairly addressed based on a careful review of the extensive documentary record before this Court.

B. *FEE AWARD*

Having carefully reviewed Citizens' application, affidavits and itemizations of fees and costs, and having given serious consideration to Bishay's arguments in opposition thereto, this Court makes the following award of collection fees and costs.

1. *General Findings*

Brown, Rudnick, Freed & Gesmer, P.C. (Brown, Rudnick) has represented Citizens in the present litigation since April of 1996. Attorney James W. Stoll (Stoll), who has been the principal attorney for citizens in this case, has 14 years experience in practice and has represented numerous banks as well as the FDIC in lender liability matters. Stoll was assisted primarily by Attorney Elise Busny, who has five years experience in practice, and by paralegal Susan Oldham.

Pursuant to the fee agreement between Citizens and Brown, Rudnick, Citizens was billed for services at a blended rate of $205 per attorney per hour. This Court finds the blended rate to be fair and reasonable. Indeed, said rate is lower than Brown, Rudnick's standard rates, which are commensurate with those charged at other firms of a similar

size and reputation. For example, Stoll's regular hourly rate varied from $275 to $325 during the period relevant to this litigation. In addition, pursuant to the fee agreement, Citizens was billed for paralegal services at the standard rate of $130 per hour. This Court also finds this rate to be fair and reasonable.

Two affidavits by Stoll set forth itemized invoices billed to Citizens by Brown, Rudnick for the period from April 25, 1996 through November 30, 1998. These invoices represent $329,207.55 in fees for close to 2,000 hours of work, as well as $31,407.08 in expenses. While this amount is large, it should be emphasized that at issue in the present litigation was a counterclaim which Bishay consistently asserted was worth $100 million. Since May of 1996, in excess of one hundred pleadings have been filed in this matter, none of which has been brief. Indeed, every point on every issue was vigorously contested by both parties. Bishay's counterclaim involved complex issues of bankruptcy law and res judicata as well as more basic contract and Chapter 93A matters. Through a series of decisions by this Court, Citizens ultimately succeeded in obtaining judgment as a matter of law on Bishay's entire counterclaim.

2. *Bishay's Objections*

This Court will now address each of Bishay's objections to Citizens' receipt of collection costs. Bishay first raises the familiar refrain that Citizens' misrepresentations with respect to its dual billing agreement with Brown, Rudnick bars it from recovering any collection costs under the loan documents. This argument has already been twice rejected,

first by the Bankruptcy Court in the fall of 1996, and then by this Court in its November 27, 1997 Memorandum and Decision of Order on Bishay's cross-motion for summary judgment. Notwithstanding Bishay's persistence in pressing such a claim, this Court declines to find Citizens' entitlement to collection costs to be affected by the existence of the dual billing agreement and its conduct before the Bankruptcy Court with respect thereto. Bishay also makes a cursory argument that Citizens should be barred from recovery because it has made repeated misrepresentations to this Court throughout the course of the present litigation. Bishay's allegations in this respect are wholly unsubstantiated and serve only to highlight his unwillingness to honor his contractual obligation to reimburse Citizens for its fees and costs in defending against his unsuccessful counterclaim.

Bishay further contends that Citizens is not entitled to fees because it has failed to demonstrate that it actually paid the requested legal fees and expenses to Brown, Rudnick. This argument lacks merit, given that Stoll's affidavit specifically states that the itemized fees and costs sought have either already been paid by Citizens or are currently owed by Citizens to Brown, Rudnick.

Bishay next complains that Citizens seeks to collect fees and expenses which it was not obligated by contract to pay Brown, Rudnick. In accordance with Citizens' May 1995 outside Counsel Policies and Procedures Manual, Citizens generally does not pay for inter-office conferences; excessive review of files, memoranda and pleadings; or multiple lawyer attendance at meetings or depositions unless approved in advance. Further, Citizens does not pay for routine in-house

photocopying, telephone, telecopying and facsimile charges; secretarial overtime; or meals, unless necessitated by overnight travel. With respect to computerized research, Citizens will pay only for use charges. Brown, Rudnick was pre-approved to perform computerized research as necessary in connection with the present case.

Bishay asserts that "Approximately $100,000 was billed for review of pleadings, papers and files which Citizens expressly refuses to pay." Citizens' itemizations do indeed reveal a multitude of hours spent by Brown, Rudnick reviewing its own pleadings, memoranda and files. Nonetheless, after carefully examining the time records, this Court did not discern excessive hours spent reviewing documents.

Further, Citizens' itemized invoices reveal numerous hours spent conferencing between attorneys on the case. However, Citizens' protocol states with respect to inter-office conferencing that "only the time of the highest-paid participant will be paid for, then only when the conference advances the matter." It appears that Brown, Rudnick adhered to this policy in its invoices, because on any particular date, only one attorney, not both, billed for conferencing activity. Again, a review of the records does not reveal any obviously excessive hours spent in inter-office conferences, and in a complex case such as this one, involving more than one trial counsel, some conferencing is to be expected.

With respect to expenses, although the invoices set forth a total of $7,851.68 for "copies," it is only routine in-house photocopying for which Citizens will not pay. The only items

which do not appear to comport with Citizens' protocol are $57.64 in meals which is not accompanied by itemized overnight travel, and $129 in "misc. expenses" which is not sufficiently itemized given that the protocol states that Citizens will not pay for non-specific billing entries. Accordingly, this Court will reduce the expenses collected by Citizens by that amount.

Finally, Bishay contends that he should not have to pay approximately $117,765.24 incurred in connection with Citizens' first summary judgment motion, which largely failed, or those fees incurred by Citizens in resisting his June 12, 1997 motion to compel, which was granted. In general, a litigant must qualify as a prevailing party in order to receive an award of attorney's fees. *Bonofiglio v. Commercial Union Ins. Co.*, 412 Mass. 612, 613 (1992). However, this Court has found no authority for the proposition that a prevailing party's success should be gaged by each individual procedural step and/or motion rather than by the overall result achieved in the case. Accordingly, Citizens's fees need not be reduced by those hours spent unsuccessfully resisting Bishay's June 12, 1997 motion to compel.

Moreover, Citizens did prevail to a large extent on its first summary judgment motion, obtaining judgment in its favor on five out of six counts of the counterclaim and successfully opposing Bishay's cross-motion for partial summary judgment. More importantly, Citizens' failure to receive summary judgment on one count of Bishay's counterclaim does not render the work done in preparation for the motion unnecessary or unreasonable. This Court

concludes that the portion of the summary judgment motion on which Citizens did not succeed cannot be severed from the successful portions so as to permit a rational diminution of fees. See *Rini v. United Van Lines, Inc.*, 903 F. Supp. 234, 238 (D. Mass. 1995), rev'd on other grounds, 104 F.3d 502 (1st Cir. 1997).

As the Appeals Court has noted, "it is altogether appropriate that the person who, in doubtful circumstances, unleashes the dogs of war should bear the heavier burden of legal costs." *Strand v. Hubbard*, 31 Mass. App. Ct. 914, 915 (1991). In the present case, Bishay vigorously pursued his purported $100 million counterclaim against the bank to no avail, despite his clear contractual obligation to pay Citizens' collection costs in the event his claim was unsuccessful.

Accordingly, after careful review of Citizens' application, affidavits and itemizations of fees and costs, and having given serious consideration to Bishay's arguments in opposition thereto, this Court determines that Citizens Bank of Massachusetts has the right to recover $329,207.55 in reasonable attorneys fees and $31,220.44 in expenses/ costs incurred from April 25, 1996 through November 30, 1998 in connection with the claims of Bishay and 1095 Commonwealth Avenue Corp. against Citizens arising from transactions between Bishay, Commonwealth Avenue Corp. and Citizens.

Appendix D

ORDER

For the foregoing reasons, it is hereby *ORDERED* that the defendants' motion for entry of separate and final judgment pursuant to Mass. R. Civ. P. 5a(b) be *DENIED*. It is further ORDERED that judgment shall enter for plaintiff Citizens Bank of Massachusetts for reasonable collection costs in the amount of three hundred sixty thousand, four hundred and twenty-seven dollars and ninety-nine cents ($360,427.99) jointly and severally against defendants Bahig Bishay, individually and as Trustee of the Old Post Realty Trust; Commonwealth Realty Trust; Hishay Motors & Leasing, Inc. f/k/a Bishay Motors, Inc.; Massachusetts Auto Group, Ltd.; and 1095 Commonwealth Ave. Corp.

s/ Gordon L. Doerfer
Gordon L. Doerfer
Justice of the Superior Court

DATED: March 17, 1999